

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

BRIAN GALE,)	
)	
Petitioner,)	
)	
v.)	No. 2:21-cv-00284-JPH-DLP
)	
T.J. WATSON,)	
)	
Respondent.)	

**Order Dismissing Petition for Writ of Habeas Corpus
and Directing Petitioner to Show Cause**

Petitioner Brian Gale seeks relief from his conviction for Discharging a Firearm in Furtherance of a Crime of Violence. For the following reasons, Mr. Gale is not entitled to habeas relief and is directed to show cause why his petition should not be dismissed.

I. Background

On November 27, 2017, Mr. Gale pleaded guilty in the Eastern District of Virginia to Interference with Commerce by Robbery under 18 U.S.C. § 1951(a) ("Hobbs Act Robbery") and Discharge of a Firearm in Furtherance of a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A). *United States v. Gale*, 4:17-cr-47-RAJ-RJK (E.D. Va.) (Crim. Dkt.) dkt. 40. He was sentenced to a total of 198 months' imprisonment. *Id.* Mr. Gale sought relief from his conviction and sentence pursuant to 28 U.S.C. § 2255 arguing that his Hobbs Act Robbery conviction does not qualify as a "crime of violence" under § 924(c). *Crim. Dkt. 50.* The district court rejected that argument and denied his § 2255 motion. *Id.* dkt. 66.

II. Discussion

Mr. Gale's habeas petition is subject to preliminary review to determine whether "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the

district court." Rule 4 of the *Rules Governing § 2254 Cases* (applicable to § 2241 petitions pursuant to Rule 1(b)); *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed.

A motion pursuant to 28 U.S.C. § 2255 is the presumptive means by which a federal prisoner can challenge his conviction or sentence. *See Shepherd v. Krueger*, 911 F.3d 861, 862 (7th Cir. 2018); *Webster v. Daniels*, 784 F.3d 1123, 1124 (7th Cir. 2015). Under very limited circumstances, however, a prisoner may employ § 2241 to challenge his federal conviction or sentence. *Webster*, 784 F.3d at 1124. This is because "[§] 2241 authorizes federal courts to issue writs of habeas corpus, but § 2255(e) makes § 2241 unavailable to a federal prisoner unless it 'appears that the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of [the] detention.'" *Roundtree v. Krueger*, 910 F.3d 312, 313 (7th Cir. 2018). Section 2255(e) is known as the "savings clause."

The Seventh Circuit has held that § 2255 is "'inadequate or ineffective' when it cannot be used to address novel developments in either statutory or constitutional law, whether those developments concern the conviction or the sentence." *Id.* Whether § 2255 is inadequate or ineffective "focus[es] on procedures rather than outcomes." *Taylor v. Gilkey*, 314 F.3d 832, 835 (7th Cir. 2002).

The Seventh Circuit construed the savings clause in *In re Davenport*, holding:

A procedure for postconviction relief can be fairly termed inadequate when it is so configured as to deny a convicted defendant any opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense.

In re Davenport, 147 F.3d 605, 611 (7th Cir. 1998). "[S]omething more than a lack of success with a section 2255 motion must exist before the savings clause is satisfied." *Webster*, 784 F.3d at 1136.

Specifically, to fit within the savings clause following *Davenport*, a petitioner must meet three conditions: "(1) the petitioner must rely on a case of statutory interpretation (because

invoking such a case cannot secure authorization for a second § 2255 motion); (2) the new rule must be previously unavailable and apply retroactively; and (3) the error asserted must be grave enough to be deemed a miscarriage of justice, such as the conviction of an innocent defendant." *Davis v. Cross*, 863 F.3d 962, 964 (7th Cir. 2017); *Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013); *see also Roundtree*, 910 F.3d at 313 (acknowledging circuit split regarding *Davenport* conditions and holding that relitigation under § 2241 of a contention that was resolved in a proceeding under § 2255 is prohibited unless the law changed after the initial collateral review).

Mr. Gale challenges his conviction under § 924(c), arguing that Hobbs Act Robbery does not constitute a crime of violence. But Mr. Gale already argued in his § 2255 motion that his Hobbs Act Robbery was not a crime of violence because some robbery offenses do not qualify as such under the so-called residual clause of § 924(c). He thus has not shown how § 2255 is ineffective or inadequate to address his challenge to this § 924(c) conviction. The savings clause is not implicated, so Mr. Gale cannot seek relief under § 2241.

III. Conclusion

For the foregoing reasons, Mr. Gale is not entitled to habeas relief under § 2241. He shall have **through September 13, 2021**, to show cause why his habeas petition should not be dismissed.

SO ORDERED.

Date: 8/16/2021



James Patrick Hanlon
United States District Judge
Southern District of Indiana

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